EX P YAP BOON ENG & ANOR

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[ORIGINATING SUMMONS NO: 24-569-00]
9 MAY 2001

TRUSTS: *Trustees - Application for vesting order as trustees for beneficiary - Whether order if granted would evade ordinary conveyancing practice of transfer of lands to beneficiary - Whether with order transfer of lands to beneficiary would only attract nominal stamp duty - Trustee Act 1949, s. 48 - Stamp Duty Act 1949, s. 16*

This was an *ex parte* application for an order for some ten pieces of land ('the lands') to be vested in the applicants as trustees for one, Yeow Ho Chiang who was the beneficiary named in the will of one Yeow Chow Her ('the deceased'). The deceased bequeathed the lands to the beneficiary and appointed the 1st appellant to manage his whole estate on behalf of the beneficiary until the beneficiary reached 21 years of age.

Held:

[1] From the provisions of the will, it would appear that the deceased directed the distribution of the lands to take place only when the beneficiary reached the age of 21. Management of the lands until then was to be in the hands of the 1st appellant. The lands must be distributed to the beneficiary by way of ordinary conveyancing practice, *ie*, by the transfer of the lands to the beneficiary. Further, any conveyance or transfer as a voluntary disposition *inter vivos* from the deceased whilst alive to the beneficiary or to himself as trustee for the beneficiary would have to have been by way of a transfer and not by way of any vesting order. It followed therefore, that the vesting order sought by the applicants, if granted, would evade the ordinary conveyancing practice (which the deceased could not have evaded if he had been alive) but still pass the beneficial interest in the lands to the beneficiary. That should not be allowed.

[2] Full stamp duty is chargeable for any conveyance or transfer operating as a voluntary disposition *inter vivos* (s. 16(1) Stamp Act 1949). However, only nominal stamp duty (RM10) is chargeable for a conveyance or transfer to a beneficiary by a trustee or other person in a fiduciary capacity under any trust, whether expressed or implied (s. 16(4) read together with First Sch. Item 37 of Stamp Act 1949). Therefore, a conveyance or transfer to the beneficiary by the applicants would only attract nominal stamp duty. On the other hand, a conveyance or transfer to the beneficiary

by the applicants as executors and trustees for the estate would attract full stamp duty. Therefore, the vesting order, if granted, would deprive the collecting authority of the full stamp duty otherwise chargeable.

[3] The applicants had not shown why they required a conveyance of the lands to them as trustees for the beneficiary in order for them to manage the lands. In fact, they could derive the authority to manage the lands from the will itself.

[Application dismissed.]

Case(s) referred to:
Arif Institute Sdn Bhd v. Tan Sri Datuk Abdul Samad Idris [1985] 2 MLJ 198 ***(refd)***
Meyappa Chetty v. Subramaniam Chetty [1916] 1 AC 603 ***(refd)***
Re Estate of Teow Cheow Choon (deceased) [1994] 3 AMR 2436 ***(refd)***

Legislation referred to:
National Land Code, s. 420
Probate and Administration Act 1959, s. 72
Stamp Act 1949, s. 16(1), (4), First Sch, item 37
Trustee Act 1949, s. 48(a)-(h)

Other source(s) referred to:
Annotated Statutes of Malaysia, 1998, vol 7

For the applicants - Mae Taye (Sharifah Noorin Alhabshi); M/s Taye & Co

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:
This is an *ex parte* application by the applicants for an order that ten pieces of lands known as Lots 7894, 7895, 7896, 7897, 7898, all in the Mukim of Tg. Sembrong, and Lots 7752 (1/5th undivided share), 5185, 5186, 6518 (1/5th undivided share), 2642, all in the Mukim of Sri Medan (hereinafter collectively referred to as the said lands) be vested unto the applicants as trustees for Yeow Ho Chiang, the beneficiary named in the will of Yeow Chow Her (deceased).

The applicant, Yap Boon Eng, affirmed in her affidavit (encl. 3) dated on 14 November 2000 and filed in support of this application, that she is the executor named in the will of Yeow Chow Her (deceased), that probate was granted to the applicants on 9 December 1999, and, that the said deceased bequeathed the whole of the said lands to Yeow Ho Chiang, but directed her to manage and administer the estate till Yeow Ho Chiang reaches 21 years of age.

Just in case it has not been made clear enough, this application is not for an order vesting the whole of said lands to the applicants as executors and trustees of the estate but for an order vesting the whole of said lands to the applicants as **trustees** for Yeow Ho Chiang.

The instant application brings to mind the case of *Re Estate of Teow Cheow Choon (deceased)* [1994] 3 AMR 2436, where the applicant/executor applied for an order vesting the subject property to the beneficiaries named in the will of the deceased. There the issue was whether a vesting order should be made by the court. But pertinent to the present application, Vincent Ng J observed, with regard to the powers of an administrator who obtains his authority solely from the grant of letters of administration and the powers of an executor appointed by the testator to execute the will, as follows:

> An administrator is a person who obtains his authority solely from the grant of letters of administration and to whom representation of the deceased is committed, by the court in default of an executor ... As he derives his authority and powers from the court, s. 60(4) of the Probate & Administration Act 1959, provides that he cannot without previous permission of the court:
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> (a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situated in any State and for the time being vested in him; or
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> (b) lease any such property for a term exceeding five years.
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> An executor is the person appointed by the testator to execute the will. And as such, he is not required to give a bond or to provide sureties for the due performance of his duties. 'To appoint an executor', says Swinburne, 'is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards payment of the testator's debts, and performance of his will'. See Swinb Pt 4, s. 2, pl 2; *Brownrigg v. Pike* [1882] 7 PD 61-64 and *Re Wells* [1968] WLR 44. Subsequent to the probate and estate duty formalities he has the task of distributing the estate as directed by the will. He does this in his other capacity as trustee. As he takes his powers from the testator himself, s. 60(3) of the Act provides that he may, without the leave of the court, charge, mortgage or otherwise dispose of all or any property of the deceased as he may think proper, subject to any restriction in the will of the deceased; and if there is such restriction he may only do so with the leave of the court.
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> ...

> Vesting orders are primarily applicable only to matters eg, application by survivors of joint tenants or beneficiaries of indentures of devolution and under the Trustee Act 1949 (Revised 1978), rather than under the Probate and Administration Act 1959 (Revised 1972). Vesting orders are available in applications under the Trustee Act 1949, as follows: in trust situations spelt out in under s. 48(a) to (h); under s. 50, on vesting orders in place of conveyance by minor in case of a trustee under disability; under s. 51, on vesting orders consequential on order for sale of land; under s. 52, on vesting orders consequential on judgment for specific performance of a contract or for sale or exchange of any interest in land; under s. 55, on vesting orders as to stock or a thing in action; under s. 58, on vesting orders of charity or society property in land, stock or thing in action; and under s. 57, on vesting orders in relations to a minor's beneficial interest in any property (movable or immovable) for maintenance, education or benefit of the minor. And s. 54 provides that in any of the above applications under the Trustee Act, the court may, if it is more convenient when making a vesting order appoint a person to convey the land or interest therein.
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> An application for a vesting order is rarely a correct procedure to adopt in probate and administration cases except in cases where eg, it is uncertain who is (or there is no) personal representative of a deceased trustee or a deceased chargee. To recap, it is trite law that there is no necessity for the executor to apply for leave to transfer land unless what he intends to effect goes against any restrictions in the will of the deceased ... it is improper for either an executor or administrator to apply for a vesting order. Section 420 of the National Land Code merely prescribes that no order vesting any alienated or any share or interest therein, in any person or body shall affect the land, share or interest in question until it has been registered pursuant to that section, and nothing else. This provision contains nothing which could be construed as permitting the executor or administrator to seek vesting orders.

The *Annotated Statutes of Malaysia*, Vol 7 (1998 Issue), in its commentary on s. 420 of the National Land Code, imparts the following further insight into the nature and utility of vesting orders:

> A vesting order is one: '... may be made by the court where any person neglects or refuses to convey any property in accordance with the terms of the order of the court or where property is vested in a trustee and it appears to the court that it be expedient to make a vesting order ... . I follows that in respect to land under the (Torrens systems) the order of the court in itself is of no value actually to vest the title in the person obtaining the vesting order ... certain ministerial acts must be done (by the Registrar) in order to effectuate the vesting of the title ... A vesting order should not be made where it is merely intended to facilitate or be a substitute for ordinary conveyancing practice': *Dotter v. Evans* [1969] VR 41, Gilliard J at p. 44-45. See also *Casella v.*

> *Casella* [1969] VR 49; *Rizos v. Rizos* [1970] VR 152. The grant of a vesting order should be used only in extreme circumstances where no other choice of relief is available, so: '... before the court is requested to make an extraordinary order of this character which by being repeatedly granted could inevitably be destructive of the Torrens system ... The court should not place itself in a position of assisting (an issue document of title) to continue in existence, with always a threat of its possible misuse at the same time as some further muniment of title ... was issued by the Registrar in accordance with the court order. The court should attempt in the first place to safeguard the principles of the Torrens system of having but one (issue document of title) in circulation in respect of any piece of land': *Dotter v. Evans* [1969] VR 41, Gilliard J at p 46-47.

Whereas s. 420 of the NLC could not be construed as permitting the executor or administrator to seek vesting orders, s. 72 of the Probate and Administration Act 1959 which provides that "a personal representative may assent to the vesting in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as trustee or personal representative, of any immovable property to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, and which devolved upon his personal representative", could not be construed as necessarily requiring the executor in his other capacity as trustee to seek vesting orders in order to execute the will.

Nonetheless, s. 48 of the Trustee Act 1949 empowers the court to make a vesting order "vesting the land or interest therein" in any such person (as spelt out in s. 48(a) to (h)) in any such manner as the court may direct. One of those persons to whom the court may make a vesting order is a trustee appointed by the court or appointed out of court under a statutory or express power. An executor and trustee named in a will is such a person to whom the court may make a vesting order. Admittedly, given that "the personal property of the testator, including all rights of action, vests in (the executor and trustee) upon the death of the testator" (see *Meyappa Chetty v. Subramaniam Chetty* [1916] 1 AC 603), a further vesting order may appear then to be somewhat extraneous. But then again, whether extraneous or not, a vesting order may facilitate the ministerial acts to be done by the registrar in order to effectuate the actual vesting of the title. Anyway, there is really no bar *per se* to the making of a vesting order vesting the land or interest therein to executors and trustees who may require such a conveyance to call in and distribute the assets of the testator or to manage the affairs of the testator after his death. Just that an applicant must prove to the court's satisfaction that he is entitled to require for a conveyance of the land to him (see *Arif Institute Sdn. Bhd. v. Tan Sri Datuk Abdul Samad bin Idris* [1985] 2 MLJ 198).

However this application, albeit by executors and trustees, is not any application for any vesting order vesting the said lands or interest therein to the executors and trustees of the estate. This is an application for a vesting order vesting the said lands or interest therein to the applicants as trustees for one Yeow Ho Chiang. The applicants gave only the following reason:

> Menurut wasiat simati, semua aset-aset harta pesaka simati tersebut diberikan kepada Yeow Ho Chiang sementara Yap Boon Eng dinamakan untuk mengurus dan mentadbir harta pesaka tersebut sehingga Yeow Ho Chiang mencapai 21 tahun.

The pertinent provisions of the said will read as follows:

> I devise and bequeath all my residue movable and immovable properties whatsoever and wheresoever including any property over which I have a general power of appointment or disposition by will, to my only son YEOW HO CHIANG.
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> I appoint my wife YAP BOON ENG to manage and act the whole estate on his behalf till he reaches the age of 21 year.

Given those provisions of the will, the testator doubtlessly bequeathed the said lands to Yeow Ho Chiang, and indeed appointed the 1st applicant "to manage and act the whole estate for his behalf till he reaches the age of 21 years". It would appear that the testator directed that the distribution of the said lands take place only when the said Yeow Ho Chiang reaches 21 years of age; management of the said lands until then, is to be in the hands of the 1st applicant. Now whatever may be the meaning of the words "to manage and act the whole estate on his behalf till he reaches the age of 21 year", to execute the will, the executors and trustees must distribute the said lands to Yeow Ho Chiang – the beneficiary named in the will. The executors and trustees would have to do so by way of the ordinary conveyancing practice – by the executors and trustees' transfer of the said lands to the beneficiary. After all, any conveyance or transfer operating as a voluntary disposition *inter vivos* from the testator whilst alive to Yeow Ho Chiang would have to have been by a transfer. Any conveyance or transfer operating as a voluntary disposition *inter vivos*, from the testator whilst alive to himself as trustee for Yeow Ho Chiang, would still have to have been by a transfer. It could not have been by way of any vesting order. The vesting order vesting the said lands to the applicants as trustees for Yeow Ho Chiang, if granted, which would evade (whereas the testator whilst alive could not evade) the ordinary conveyancing practice but still pass the beneficial interest in the said lands to Yeow Ho Chiang, cannot be allowed.

There is reason yet why this application cannot be allowed. Full stamp duty is chargeable in the case of any conveyance or transfer operating as a voluntary disposition *inter vivos* – Stamp Act 1949 s. 16(1). However, only nominal stamp duty (RM10) is chargeable "in the case of a conveyance or transfer ... made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust, whether expressed or implied" – Stamp Act 1949 s. 16(4) read together with the First Schedule item 37 of the same said Act. This translates, that a conveyance or transfer to Yeow Ho Chiang by the applicants as trustees for Yeow Ho Chiang would only attract nominal stamp duty. On the other hand, a conveyance or transfer to Yeow Ho Chiang (the ordinary conveyancing practice) by the applicants as executors and trustees for the estate (note: First Schedule item 37 does not apply to a declaration of any use or trust of or concerning any property by a will) would attract full stamp duty. So quite evidently, this sought after order vesting the said lands to the applicants as trustees for Yeow Ho Chiang, if granted, would deprive the collecting authority of the full stamp duty otherwise chargeable. Maybe the real purpose of seeking this vesting order may not be to avoid paying stamp duty. That only the applicants will know for sure. Suffice to say that the applicants have not proved to the court's satisfaction that they are entitled to demand for a conveyance of the said lands to them as trustees for Yeow Ho Chiang. The applicants have not shown why they require a conveyance of the said lands to them as trustees for Yeow Ho Chiang in order for the 1st applicant/ applicants to manage the said lands. In fact, deriving authority from the will of the testator, the 1st applicant/applicants could manage the said lands without any conveyance of the said lands to the applicants as trustees for Yeow Ho Chiang. For the reasons herein, this application is dismissed.